IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 396.

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL NO. 298, A. F. of L., and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY,
Petitioners,

vs.

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD ZAHN and THEODORE OUDENHOVEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The memorandum opinion of the Circuit Court for Door County (R. 1) is unreported. The opinion of the Wisconsin Supreme Court (R. 24) is reported in 4 Wis. 2d 142, 89 N. W. 2d 920.

JURISDICTION.

The Wisconsin Supreme Court on May 6, 1958, entered a judgment affirming the issuance of a permanent injunction against peaceful picketing being conducted by Petitioners (R. 34). A timely motion for rehearing was filed on May 19, 1958, and denied on June 26, 1958 (R. 38). The jurisdiction of this Court rests on 28 U. S. C., Sec. 1257 (3).

QUESTION PRESENTED.

Whether a state court has jurisdiction to enjoin peaceful picketing at the site of a county building project, upon the joint complaint of the county government and two private contractors, where the picketing occurred in the course of a dispute between the Union and the private contractors and affected interstate commerce.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are Article I, Section 8, and Article VI, Section 2, of the United States Constitution. Article I, Section 8, in material part, provides:

> "The Congress shall have power . . . to regulate commerce . . . among the several states . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Article VI, Section 2, in material part, provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The statutory provisions primarily involved are Sections 2 (1)-(2), 8 (b) (4) (A) and (B) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C., Sec. 151 et seq. (referred to as the "National Act"). These sections of the National Act, together with all others cited, are printed in Appendix A of this brief.

STATEMENT.

Petitioner Plumbers, Steamfitters, Refrigerator, Petroleum Fitters, and Apprentices of Local 298, A. F. of L., is a labor organization having offices in Green Bay, Wisconsin (R. 7). Petitioner Building and Construction Trades Council of Green Bay, Wisconsin, and vicinity is an organization composed of representatives of building trades unions in and about Green Bay, Wisconsin (R. 7). Petitioners are collectively referred to as the "Union".

Respondent, County of Door (referred to as the "County"), is a municipal corporation (R. 6). Respondent Arnold G. Zahn (referred to as "Zahn") is a plumbing contractor residing in Sturgeon Bay, Wisconsin (R. 6). Respondent Theodore Oudenhoven (referred to as "Oudenhoven") is a general contractor residing in Kaukauna, Wisconsin (R. 6).

In March, 1957, the County entered into contracts with Zahn and Oudenhoven, among others, for the performance

of work in connection with the construction of an addition to the County's courthouse (R. 7). Out-of-state materials valued at $225,000 were used in the construction of the courthouse addition (R. 22).

Commencing on June 26, 1957, the Union engaged in peaceful picketing to advertise the non-union status of Zahn's employees (R. 7). Employees of union contractors working on the project refused to cross the picket line (R. 7-8).

The District Attorney of the County filed, in the Circuit Court for Door County, a joint complaint on behalf of the County, Zahn and Oudenhoven (R. 3), alleging that the Union's picketing was illegal because no labor dispute existed between Zahn and his employees (R. 4). Answering, the Union denied the material allegations of the complaint (R. 5) and affirmatively alleged that, pursuant to the National Act, exclusive jurisdiction over the subject matter of the controversy was vested in the National Labor Relations Board (referred to as the "Labor Board") (R. 6).

This defense was rejected by the trial court (R. 2), which held that the picketing was unlawful under Section 6 (2) (b) of the Wisconsin Employment Relations Act, Wis. Stats., Sec. 111.06 (2) (b) (1955), in that the Union's purpose was to cause a work stoppage and thereby compel Zahn to interfere with his employees' right of self-organization (R. 8)[1]. A temporary restraining order, is-

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[1] Section 111.06 (2) (b) provides:

"It shall be an unfair labor practice for any employe individually or in concert with others: * * *

"(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would

sued on July 27, 1957 (R. 9), was followed by a permanent injunction on October 23, 1957 (R. 10).

On appeal to the Wisconsin Supreme Court, the Union sought a reversal of the unlawful purpose finding and again asserted that exclusive jurisdiction over the controversy was vested in the Labor Board. The trial court's finding that the Union's peaceful picketing violated Section 6 (2) (b) of the Wisconsin Employment Relations Act was affirmed (R. 30). The Wisconsin Supreme Court considered but rejected the contention that exclusive jurisdiction over the controversy was vested in the Labor Board (R. 30-34).

The majority below disagreed with the holding of the Labor Board and the United States Court of Appeals for the Third Circuit in *Peter D. Furness*, 117 N. L. R. B. 437, *enf'd sub nom., NLRB v. Electrical Workers, Local 313*, 254 F. 2d 221 (C. A. 3), which sustained the right of a county government to invoke the procedures of the National Act against union picketing violating the National Act, and demonstrates the Labor Board's jurisdiction in this type of case (R. 32).

One member of the court, concurring, acknowledged the binding effect of the Labor Board's ruling (R. 35), but held that peaceful picketing, in the course of disputes affecting interstate commerce, is not completely regulated under the National Act (R. 36). Reasoning from this

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constitute an unfair labor practice if undertaken by him on his own initiative."

Section 111.04 provides:

"*Rights of employes.* Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing; and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

premise, the concurring justice concluded that peaceful picketing which affects governmental construction is subject to restraint pursuant to an application of state labor law notwithstanding the fact that the dispute affects interstate commerce (R. 36).

One member of the court, dissenting, concluded that the familiar rules of pre-emption barred state action for "the picketing involved in this action is unlawful, if at all, only because it is conduct in the field of labor relations and constitutes an unfair labor practice under the National Act" (R. 38).

The case is here on writ of certiorari.

SUMMARY OF ARGUMENT.

This proceeding involves the familiar question of the extent of federal preemption over labor controversies affecting interstate commerce. Specifically, the issue is whether a state court has jurisdiction to enjoin peaceful picketing at the site of a county building project, upon the joint complaint of the County and two private contractors, where the picketing occurred in the course of a dispute between the Union and the private contractors and affected interstate commerce.

Had the dispute arisen while the employers involved were engaged in the construction of a privately owned building, state jurisdiction would have been preempted under this Court's decision in *San Diego Building Trades Council v. Garmon*, 353 U. S. 26. The joinder of the County, an entity excluded from the National Act's definition of an "employer," as a co-plaintiff does not alter the nature of the dispute. Nor does such joinder revive otherwise preempted state jurisdiction. *Cf. Local Union No. 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155. If the County had filed charges with the Labor Board, the Board's jurisdiction would have been effectively invoked. *Local Union No. 313*, 117 N. L. R. B. 437, *enf'd, sub nom., NLRB v. Electrical Workers, Local No. 313*, 254 F. 2d 221 (C. A. 3). Of course, either of the two employers involved could have filed similar charges.

Reduced to its essential elements, this case poses the same question considered in *Local Union No. 25*. There, as here, intertwined but distinct Congressional policies could be fully implemented only by reaffirming the exclusive jurisdiction of the Labor Board to regulate disputes within its statutory authority. The recognition of exclusive Labor Board jurisdiction, in the circumstances of this case, does not, however, imply that the jurisdiction of the

states to adopt whatever labor policies the state deems proper with respect to state employees is in any way diminished.

A state may avoid the impact of federal regulation in the field of labor relations by employing, directly, the employees needed to perform the work which the state desires to accomplish. In the instant case, the state elected to utilize the services of private employers and their employees. Having done so, the state must accept the complex of federally imposed rights and duties which circumscribe the activities of the contractor, his employees, and the unions representing employees in the trade.

The dispute involved in this case was one over which the Labor Board is empowered and directed to exercise jurisdiction. Neither the express provisions of the National Act nor its legislative history suggest that the exclusive jurisdiction of the Labor Board is dependent upon the *locus in quo* of the dispute. Rather, the narrowly limited terms of Section 2 (2)-(3), conserving state jurisdiction to regulate the employment relationship of state employees, indicates a clear intent to pre-empt state jurisdiction where, as here, state employees are not involved.

Moreover, if state jurisdiction were recognized in the circumstances of this case, a vital segment of the construction industry now covered by the National Act would be subject to concurrent and inevitably conflicting regulation.

ARGUMENT.

The Regulation of Peaceful Picketing Occurring in the Course of Disputes Between Employers and Labor Organizations Has Been Totally Pre-empted by the National Act Where, as Here, the Dispute Affects Interstate Commerce. Such Pre-emption Exists Notwithstanding the Fact That a State Agency Joins, as a Co-plaintiff in Subsequent Litigation, With the Employers Involved in the Dispute.

But for the fact that the picketing involved in this case took place at the premises of a county building project, the judgment below would be squarely foreclosed by the prior decisions of this Court (e. g., *Local Union 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155; *Garner v. Teamsters Union*, 346 U. S. 485). Hence, the critical question is whether otherwise pre-empted state jurisdiction is revived where, as here, a dispute between a labor organization and a private employer affects a public construction project. Before discussing this question, several subsidiary issues raised by the opinions below are considered.

A. The dispute involved potential violations of Section 8 (b) (4) (A) and (B), and affected interstate commerce.

Materials manufactured outside the state of Wisconsin, having a value of $225,000, were utilized in the course of the building project affected by the dispute in this case (R. 22). Although the trial court held that the dispute did not affect interstate commerce (R. 2), its finding in this regard was not adopted by the Wisconsin Supreme Court. Both the majority (R. 30-34) and concurring (R. 34-36) opinions in the court below assume that the dispute affected interstate commerce. The contrary view of the trial court was properly rejected. *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U. S. 675, 683-684.

In view of the substantial value of the materials manufactured outside the state which were used on the project, it may be fairly inferred that some of the employers involved were subject to the Labor Board's jurisdictional standards. Since potential violations of Section 8 (b) (4) were involved, the interstate business of both the primary and the secondary employers is to be considered. *Samuel Langer*, 82 N. L. R. B. 1028, 1033-1038, *aff'd sub nom., NLRB v. Electrical Workers*, 341 U. S. 694, 699. *See also: Euclid Foods, Inc.*, 118 N. L. R. B. 130, 131; *McAllister Transfer, Inc.*, 110 N. L. R. B. 1789, 1772.

In any event, it is clear that the applicability of the federal pre-emption doctrine is not dependent upon a finding that the employer involved meets the Labor Board's dollar volume jurisdictional standards. *Guss v. Utah Labor Board*, 353 U. S. 1.

In substance, the courts below viewed the picketing as an attempt by the Union to induce a work stoppage by the employees of neutral subcontractors for the ultimate purpose of compelling Zahn to recognize the Union as the representative of his employees (R. 28). These findings, if made by the Labor Board, would bring the case squarely within the prohibitions of Section 8 (b) (4) (A) and (B) of the National Act. *Local Union No. 313*, 117 N. L. R. B. 437, *enf'd sub nom., NLRB v. Electrical Workers, Local 313*, 254 F. 2d 221 (C. A. 3).

Hence, it is clear that the picketing constituted an alleged "unfair labor practice (listed in section 8) affecting commerce" which, under Section 10 (a), "the Board is empowered . . . to prevent." Under this Court's decisions state regulation of such disputes affecting *private* construction is foreclosed. *San Diego Building Trades Council v. Garmon*, 353 U. S. 26; *Pocatella Building Trades Council v. Elle*, 352 U. S. 884; *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933. As

will be demonstrated below, a different rule should not be adopted for cases in which the dispute affects *public* construction.

B. The exclusive jurisdiction of the Labor Board over peaceful picketing includes jurisdiction over picketing occurring in the course of disputes, between employers and labor organizations, which affect public construction projects.

1. Federal pre-emption applies even though a neutral affected by the dispute is not an "employer" as defined in the National Act.

Here, conduct falling squarely within the area regulated by Section 8 (b) (4) (A) and (B) of the National Act has been enjoined by a state court pursuant to an application of a state labor relations act notwithstanding the fact that the dispute was one affecting interstate commerce. The dispute was precipitated by the non-union status of Respondent Zahn, a private employer performing construction work on a public construction project. The work stoppage, allegedly caused by the picketing, was engaged in by employees of private employers who were also performing services on the project.

Thus, if either of the two employers involved in this case had filed unfair labor practice charges with the Labor Board, the jurisdiction of that tribunal would have been effectively invoked. As in *Garner v. Teamsters Union*, 346 U. S. 485, 488, we do not have "an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which, therefore, either is 'governable by the state or is entirely ungoverned.' "

Moreover, under the authority of this Court's decision in *Local Union No. 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155, the Respondent, Door County, could have

invoked the procedures of the National Act either by filing an independent charge or by filing a joint charge with the private employers involved in the dispute.

In *Local Union No. 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155, a state court injunction was issued against peaceful picketing occurring at a railroad loading site. The state courts rejected a claim of federal pre-emption reasoning that the express exclusion of railroads as employers under the National Act thereby divested the Labor Board of jurisdiction over controversies affecting such entities. On writ of certiorari, the state court judgment was reversed.

In *Local Union No. 25*, this Court pointed out that, while the labor relations of railroads *vis-a-vis* their employees was excluded from the Labor Board's jurisdiction, such exclusion did not "divest the National Labor Relations Board of jurisdiction over controversies otherwise within its competence solely because a railroad is the complaining party. Furthermore, since railroads are not excluded from the Act's definition of 'person,' they are entitled to Board protection from the kind of unfair labor practice proscribed by Section 8 (b) (4) (A)." 350 U. S. at 160.

As a direct consequence of this ruling, the Labor Board, with the approval of the Court of Appeals for the Third Circuit, held that the County of New Castle, Delaware, was entitled to the protection of Section 8 (b) (4) (A) and (B). *Local Union No. 313*, 117 N. L. R. B. 437, *enf'd sub nom., NLRB v. Electrical Workers Local 313*, 254 F. 2d 221 (C. A. 3). There, as here, the County was engaged in a construction project which was halted by union picketing precipitated by the presence of a non-union subcontractor on the job. In exercising jurisdiction over the dispute, the Labor Board stated (117 N. L. R. B. at 441):

"Thus the court [in *Local Union No. 25 v. New York, New Haven Railway Co.* 350 U. S. 155] ex-

plicitly pointed out that Congress' failure to specifically exclude railroads (and *a fortiori* political subdivisions) from the definition of the term 'person' as used in Section 2 (1) did not disqualify such entities from the Act's protection against secondary pressures."

Accord:

Freeman Construction Co., 120 N. L. R. B. No. 106;
New Mexico Branch, Assoc. General Contractors, 120 N. L. R. B. No. 58.

Cf.

NLRB v. Springfield Building Trades Council, 43 L. R. R. M. 2320 (C. A. 1);
22nd National Labor Relations Board Annual Report, 99-100.

The court below, in holding that the Labor Board and the Court of Appeals have erred in their construction of the National Act, relied primarily upon state decisions holding that the governmental agencies are impliedly excluded from the coverage of statutes of general application. Reference to several decisions of this Court was also made (R. 32-34).

However, the court below gave no consideration to the frequent occasions upon which it has been held that statutes of general application encompass state agencies within the ambit of the statutory term "person." This Court has not hesitated to apply federal statutes to state agencies where, as here, the subject matter regulated and the scheme of the statute itself supported such a construction. This has been done even though the statute in question did not refer specifically to state agencies. *California v. United States*, 320 U. S. 557, 585-586; *Georgia v. Evans*, 316 U. S. 159, 161-163; *Case v. Bowles*, 327 U. S. 92, 98-100; *United States v. California*, 297 U. S. 175, 185-187;

Ohio v. Helvering, 292 U. S. 360, 370; *South Carolina v. United States*, 199 U. S. 437, 448.

Benz v. Compania Naviera Hidalgo, 353 U. S. 138, is not to the contrary. *Benz* held only that the National Act does not apply "to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by a foreign crew under foreign articles. . . ." 353 U. S. at 139. In the instant case, the controversy involved disputants over whom the Labor Board is empowered and directed to exercise jurisdiction.

The reasoning of the court below closely parallels that urged in *California v. Taylor*, 353 U. S. 553, where the state sought to escape the applicability of the Railway Labor Act by reliance on the rule that a federal statute is presumed not to restrict a constituent sovereign state unless it expressly so provides. Rejecting that contention (353 U. S. at 562):

> "This court said that this presumption 'is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated.' [*United States v. California*, 297 U. S. 175, 186.]"

Significantly, the court below, without discussion, permitted a state agency to invoke the proscriptions of the state labor relations act against the picketing involved in this case even though the crucial definitional sections of the state and federal law are in all material respects the same.[2] It would appear, therefore, that the court below

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[2] Wis. Stats., Section 111.02, in material part, provides that:

"When used in this subchapter:

"(1) The term 'person' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees or receivers.

"(2) The term 'employer' means a person who engages the services of an employe, and includes any person acting on be-

was primarily concerned with conserving jurisdiction to regulate alleged unfair labor practices. Had the strike been lawful in the view of the court below, no injunction would have been permitted. Yet, the same interference with the progress of the construction job would have resulted irrespective of the legality of the union's objective.

Under the decisions of this Court, the Court of Appeals, and the Labor Board, municipal corporations are entitled to protections of Section 8 (b) (4) (A) and (B) of the National Act. The only contrary view expressed to date is that of the court below. Thus, this case demonstrates perhaps more clearly than any other heretofore decided, the potentialities for conflict inherent in the exercise of the concurrent jurisdiction by federal and state tribunals over conduct regulated by the National Act.

In view of the holdings discussed above, we submit that the court below erred when it refused to follow the decision of the Labor Board in *Peter D. Furness*, 117 N. L. R. B. 437, *enf. sub nom., NLRB v. Electrical Workers, Local 313*, 254 F. 2d 221 (C. A. 3), with respect to the scope of the National Act's coverage. *Cf., Tacoma v. Tax Payers of Tacoma*, 357 U. S. 320, 336, 337. The Labor Board's decision in the *Electrical Workers* case follows inescapably from the previous ruling of this Court in *Local Union No. 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155. Since either the County or the employers affected were entitled to file an unfair labor practice charge with the Labor Board, this case is one falling within the exclusive jurisdiction of that tribunal.

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half of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact."

2. Reconciliation of competing interests of employees, employers and of the states with the express provisions of the National Act requires the application of federal pre-emption to the dispute involved in this case.

The Labor Board's construction of the National Act, pursuant to which the protection of Section 8 (b) (4) is extended to state agencies, is the only permissible construction if the competing interests of employees, employers and state agencies are to be reconciled with the express provisions of the National Act. Certainly, Section 7 rights guaranteed employees whose employers are engaged in commerce should not be diluted merely because their employer successfully bid on a highway or courthouse job. Nor should the complex of federal rights enjoyed by employers be affected by the vagaries of competitive job bidding. Contrariwise, the National Act should not be construed in a manner which will impinge upon the state's right to deal with its own employees in the manner dictated by local policy.

Accommodation of these competing policies is achieved by the Labor Board's construction of the National Act. Cogently similar considerations caused this Court to state in *Local Union 25 v. New York, New Haven Ry. Co.*, 350 U. S. 155, 160-161, that:

> "This interpretation permits the harmonious effectuation of three distinct congressional objectives: (1) to provide orderly and peaceful procedures for protecting the rights of employers, employees and the public in labor disputes so as to promote the full, free flow of commerce, as expressed in section 1 (b) of the Labor Management Relations Act; (2) to maintain the traditional separate treatment of employer-employee relationships of railroads subject to the Railway Labor Act; and (3) to minimize diversities and conflicts likely to result from a variety of local pro-

cedures and attitudes toward labor controversies.' *Garner v. Teamsters Union*, 346 U. S. 485, 490."

The same "effectuation of . . . distinct congressional objectives" can be accomplished in this case only if the Labor Board's construction of the National Act is accepted and the states precluded from exercising concurrent jurisdiction over labor disputes such as the one involved in this case.

3. The carefully limited areas of state jurisdiction unaffected by the National Act evidence a Congressional intent to preclude concurrent regulation of peaceful picketing occurring in the course of disputes affecting public construction projects.

The permissible areas of state participation in the administration of federal labor policy was carefully considered by the Congress when it enacted the 1947 amendments to the National Act. Thus, Sections 2 (3), 10 (a), 14 (b), 202 (c) and 203 (b) of the National Act define, in precise terms, areas in which state jurisdiction is unaffected by the National Act. Except for those areas in which state jurisdiction is expressly saved by the National Act, it must be concluded that state regulation is barred. For, as this Court observed in *Amalgamated Association v. Wisconsin Board*, 340 U. S. 383, 398:

> "Congress knew full well that its labor legislation 'preempts the field that the Act covers in so far as commerce within the meaning of the Act is concerned [H. R. Rep. 245, 80th Cong., 1st Sess., p. 44 (1947] and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative [* * * Sections 2 (2) and 2 (3) of the Federal Act . . . specifically exclude from its operation the employees of 'any state or political subdivision thereof']."

The National Act itself, in Section 2 (3), and the legislative debates (93 Cong. Rec. 6686, 7000-7001), evidence the care with which Congress avoided any attempt to regulate, under the National Act, labor relations controversies between excluded employers and their employees. However, a similar exclusion of disputes between employers and labor organizations covered by the National Act, which may affect an excluded employer, is not to be found in the National Act.

The concurring opinion below concedes that "if it were not for Door County being a party plaintiff, there would be federal preemption here . . ." (R. 34). Yet the same opinion seeks to sustain state jurisdiction on the theory that "national government, in the exercise of its powers, may not prevent the state, or an agency thereof, from discharging its ordinary functions of government" (R. 35-36).

Thus, the concurring opinion both concedes and overlooks the undisputed power of Congress to regulate the conduct of labor disputes between private employers and labor organizations which affect interstate commerce. *NLRB v. Jones & L. Steel Corp.*, 301 U. S. 1, 30-32. Since the power of Congress to regulate such conduct is firmly established, the only remaining question is whether Congress has exercised its power with the intention of precluding concurrent state regulation. As demonstrated above, Congress has manifested an unmistakable intention to exclude concurrent regulation over disputes of the type involved in this case.

Of course, a state agency can avoid the impact of federal regulation by hiring, directly, craftsmen to perform the construction work which the state wishes to accomplish. *Paper Makers Importing Co.*, 116 N. L. R. B. 267. But where, as here, the state agency engages private employers and their employees to perform the work, it must accept the complex of rights and duties imposed by the National

Act upon the employer, his employees, and labor organizations engaged in representing employees in the craft.

Moreover, several erroneous assumptions underlie the analysis of the concurring justice below. First, the concurring opinion assumes that the participation of Door County as a co-plaintiff renders the doctrine of federal pre-emption inapplicable (R. 34). As *Garner v. Teamsters Union*, 346 U. S. 485, 498, teaches, this is not the case:

> "The conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent."

See also:

Weber v. Anheuser-Busch, 348 U. S. 468, 479-480.

Second, the opinion assumes that labor disputes between employers and labor organizations subject to the National Act are amenable to regulation under a state labor act if, in the state's view, the dispute affects an important state function. The same reasoning was urged and rejected in *Wisconsin E. R. Board v. Milwaukee G. L. Co.*, 258 Wis. 1, 8, 44 N. W. 2d 547, 551, *rev'd sub nom., Amalgamated Assoc. v. Wisconsin Board*, 340 U. S. 383.

Third, the concurring opinion concedes the right of the county to obtain a remedy under the National Act but asserts that the applicability of the doctrine of pre-emption would "prevent the state . . . from discharging its ordinary functions of government" (R. 35-36). Whatever weight this argument might otherwise have is completely dissipated by the fact that the sole basis for enjoining the picketing was its unlawfulness under the state labor act. Precisely the same result or interference will flow from a primary strike for higher wages by a contractor's employees or from a similar strike by the employees of an essential supplier.

As the dissenting justice below observed, "the picketing involved in this action is unlawful, if at all, only because it is conduct in the field of labor relations and constitutes an unfair labor practice under the National Act" (R. 38). We respectfully submit that the considerations summarized above demonstrate that state jurisdiction, in this case, cannot be supported either by the reasoning of the majority or the concurring justice below.

4. The existence of concurrent power in state tribunals to regulate such disputes would result in conflicting labor policies in a vast area now covered by the National Act.

During the calendar year 1957, over 48 billion dollars worth of construction work was performed in the United States. Of this 48 billion dollars, over 14 billion dollars worth of construction, or almost 30% of the total, consisted of public construction financed by federal and state governments. Expenditures for highway construction, public housing, and public buildings constitute an important part of the total value of public construction. 81 Monthly Labor Review 1214. *Cf.* Note, *"Special Labor Problems in the Construction Industry,"* 10 Stan. L. Rev. 525, 526-530 (1958).

If state tribunals are permitted to exercise concurrent jurisdiction over disputes between employers and labor organizations which affect public construction projects, 30% of a 48 billion dollar industry, now covered by the National Act, will be subjected to divergent and conflicting labor policies. Such potentialities for conflict provide the underlying reason for the "general intent to pre-empt the field" and the "proviso to Section 10 (a) with its inescapable implication of exclusiveness" which were held to exclude state jurisdiction in *Guss v. Utah Labor Board*, 353 U. S. 1, 10.

C. Since any of the employers affected by the dispute could have filed charges under the National Act, the state court had no jurisdiction to proceed in the instant case irrespective of the right of a governmental subdivision to invoke the procedures of the National Act.

Even if the National Act were construed to bar state and federal agencies from invoking its protections, the judgment below nevertheless should be reversed. Following *Garner v. Teamsters*, 346 U. S. 485, this Court has had eleven occasions to directly consider the question of whether state courts have jurisdiction to regulate peaceful picketing where the picketing occurs in the course of the dispute affecting interstate commerce. In each of these cases it has been held that state jurisdiction has been preempted. *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131; *District Lodge 34 v. Cavett Co.*, 355 U. S. 39; *Electrical Workers Local 429 v. Farnsworth & Chambers Co.*, 353 U. S. 969; *San Diego Building Trades v. Garmon*, 353 U. S. 26; *Amalgamated Meat Cutters v. Fairlawn Meats*, 353 U. S. 20; *Retail Clerks Union v. J. J. Newberry Co.*, 352 U. S. 987; *Pocatello Building Trades Council v. Elle*, 352 U. S. 884; *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62; *Local Union 25 v. New York, New Haven Railroad*, 350 U. S. 155; *Weber v. Anheuser-Busch*, 348 U. S. 468; *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933.

These decisions recognize that in the area of peaceful picketing, as in the instance of representation elections, "a case-by-case test of federal supremacy" is not permissible. *Bethlehem Steel Co. v. New York Labor Board*, 330 U. S. 767, 776. Expression of this principle is found in *Garner* (346 U. S. at 499-500):

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the

National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

In view of the total pre-emption of the field of peaceful picketing the correctness of the judgment below does not turn upon the right of a state agency to invoke the procedures of the National Act. The dispute involved in this case was one between parties subject to the jurisdiction of the Labor Board. The dispute was one over which the Labor Board is empowered and directed by the Congress to exercise jurisdiction. Concurrent state regulation, if permitted, will inevitably lead to chaos in the construction industry.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

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APPENDIX.

Section 2 (1) (2) of the Act provides:

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Section 7 of the Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 8 (b) (4) (A) and (B) of the Act provides:

"It shall be an unfair labor practice for a labor organization or its agents——

* * * * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9;

* * *"

Section 10 (a) of the Act provides:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications,

and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Section 14 (b) of the Act provides:

"Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

Section 202 (c) of the Act provides:

"The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year."

Section 203 (b) of the Act provides:

"The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its

judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement."